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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

September 1, 1999

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Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

Re: CC Docket No. 99-230  
Reply Comments of Cablevision Systems Corporation

Dear Ms. Salas:

Enclosed for filing on behalf of the Cablevision Systems Corporation are an original and (4) copies of Cablevision Systems Corporation's Reply Comments on the Notice of Inquiry in the above-captioned proceeding. We have also enclosed a copy to be date-stamped and returned. A copy on diskette has been forwarded to Marcia Glauberman of the Cable Services Bureau.

Thank you in advance for your assistance.

Sincerely,

*Frank W. Lloyd* BFB

Frank W. Lloyd

Enclosure

cc: Marcia Glauberman (w/diskette)

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )

)  
Annual Assessment of the Status of )  
Competition in Markets for the )  
Delivery of Video Programming )

CS Docket No. 99-230

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION**

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September 1, 1999

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**REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION**

Cablevision Systems Corporation ("Cablevision") submits these reply comments in the Commission's annual assessment of and report to Congress on the state of competition among multichannel video programming distributors ("MVPDs"). Cablevision wants to underscore the intensifying competition reflected in the record of this proceeding and the resulting diminished need for regulation. The competition that Cablevision faces throughout its markets from RCN, Ameritech, New Media, and SNET in addition to DBS, MMDS and SMATV operators represents an emerging new paradigm for the multichannel video market.

**INTRODUCTION AND SUMMARY**

Cablevision is one of the leading telecommunications and entertainment companies in the United States. It operates cable television systems with more than 3.6 million subscribers in six states. Through its 75-percent-owned subsidiary Rainbow Media Holdings, Inc., Cablevision has ownership interests in companies that produce and distribute innovative national and regional programming services and sports entertainment. Through its wholly-owned subsidiary Cablevision Lightpath, Inc. ("Lightpath"), Cablevision also is providing facilities-based telephony services to customers in Long Island and Connecticut, and plans to roll out such services in all the markets it serves.

Cablevision recently has invested hundreds of millions of dollars to upgrade and rebuild its broadband cable plant to provide an array of basic and advanced services to residential customers -- not only a new generation of video services, such as video on demand and digital programming, but also high-speed Internet services and telephony. Cablevision launched Optimum Online in 1997 and subsequently launched Optimum@Home, high-speed Internet services that links PC users to the World Wide Web via cable modems and Cablevision's broadband infrastructure. Cablevision's high-speed service is now available to over 650,000 homes. One of the unique features of this service is its local online content developed specifically for the needs and interests of the local market.<sup>1/</sup> Lightpath currently serves commercial customers through more than 40,000 access lines and offers residential service to over 60,000 homes.

With 2.7 million customers in the highly competitive New York metropolitan area market, Cablevision through Rainbow Media is continuing its tradition of innovation in regional and local programming. News 12 Long Island, the country's first 24-hour regional news service, has now fostered the News 12 Network of regional services in Connecticut, New Jersey, Westchester County, New York, and the Bronx, New York. Additionally, in 1998, Rainbow launched the MetroChannels, a suite of channels devoted to life in the New York City tri-state area.

Cablevision is making these investments in programming and infrastructure with no guaranteed return. The size of the investments is matched only by the risk associated with them.

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<sup>1/</sup> See B. Esbin, "Internet Over Cable: Defining The Future in Terms of The Past," Office of Plans & Policy Working Paper Series, No. 30 (Aug. 1998) at 79 (Optimum Online has "significant operator-provided content").

Cablevision will incur most of the expenses of building advanced broadband infrastructure or developing new programming whether these services attract one customer or one million. It has undertaken these risks because it considers them necessary to position itself for competition; by developing innovative and advanced programming services, Cablevision differentiates itself from its competitors and responds to the marketplace.

Cablevision's reply in this proceeding focuses on comments by RCN Corporation ("RCN") and, to a lesser extent, by Ameritech New Media, Inc. ("Ameritech"). Because it competes directly against RCN in Massachusetts and New York and against Ameritech in Ohio, it is to RCN and Ameritech that Cablevision is in the best position to respond.

The comments of RCN, Ameritech, and other noncable MVPDs tell a story of rapid – and accelerating – growth by these wireline providers. As RCN states in its first substantive heading, "RCN is building a competitive presence in numerous MVPD markets."<sup>2/</sup> Indeed, the growth of RCN and Ameritech exceeds even that of DBS reported in the comments of NCTA.<sup>3/</sup> Cablevision faces increasing and intense competition from these affiliates of major utilities throughout much of Cablevision's territories, in addition to competition from DBS everywhere and significant competition from SMATV providers and wireless services in major markets. RCN's efforts to color this story with a list of grievances against competitors and the Cable Services Bureau cannot obscure the unmistakable facts that cable competition is growing inexorably and that cable competitors are poised to grow much more still.

Against this background, RCN's exhumation of every pending issue involving allegedly underhanded competitors or a purportedly blundering Cable Services Bureau amounts to nothing

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<sup>2/</sup> Comments of RCN Corporation ("RCN Comments") at 4.

more than gratuitous poormouthing. In any event, examination of each of the items on RCN's list of things that supposedly stand between it and even faster growth demonstrates that none is a significant barrier to competition and that each should be resolved on its own merits without deliberately tilting the competitive playing field with additional regulation.

If, as RCN reports, it is gaining wireline subscribers in New York at a rate of 1,100 per month,<sup>4/</sup> its program access complaint hardly compels an unprecedented extension of program access rules to terrestrial programming. Given that Cablevision has received no further requests from RCN for access to home run wiring, access to such wiring is hardly such an obstacle to warrant the novel ruling RCN seeks from the Commission. And RCN's own stated indifference to Open Video System status, if not outright preference for Title VI cable franchising, hardly makes a strong case that the OVS classification requires special protection. RCN and Ameritech both are affiliates of major utilities that enjoy competitive advantages of their own, and are more than capable of contending in the marketplace without special intervention on their side.

In short, even more than in past years, the record in this proceeding tells a story of growth in multichannel video programming competition. The comments of RCN and Ameritech tell the same story. Competition is not endangered; rather, their continuing and accelerating growth promises only increased competition.

Against the background of intensifying competition, new schemes of forced access to broadband facilities, terrestrial programming, electronic program guides, or accessible home run wiring have no place, especially when they may deter the kind of investment Cablevision and other cable operators are making in broadband infrastructure, innovative programming, and

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<sup>3/</sup> Comments of the National Cable Television Association ("NCTA Comments") at 1, 5-6.

advanced services. In a competitive marketplace, the Commission should be moving in the direction of deregulation and forbearance rather than toward increased regulation.

**I. THE COMMENTS OF MVPD COMPETITORS TO CABLE ESTABLISH FAST-GROWING COMPETITION.**

**A. In Markets Served by Cablevision, MVPD Competition Is Aggressive And Widespread.**

The comments of RCN, Ameritech, and other MVPD competitors to cable demonstrate that competition is robust and mushrooming. RCN begins its comments with the heading “RCN is building a competitive presence in numerous MVPD markets.”<sup>5/</sup> RCN has more than tripled the number of its video connections since the end of 1998.<sup>6/</sup> It reported a 50 % growth in video connections in the fourth quarter of 1998 alone,<sup>7/</sup> which far outpaces even the 38.6 % annual growth for DBS.<sup>8/</sup> It has 5,000 video connections in Boston and, in New York City, RCN is adding wireline subscribers at a rate of 1,100 per month.<sup>9/</sup> Ameritech reports almost as rapid growth; in the past year, it increased its number of subscribers by 67% to 250,000.

In Massachusetts, to date, RCN has local authority to serve 64% of Cablevision’s market and is actively building in communities representing 57% of that market. In Connecticut, SNET presently offers competing cable service to over 165,000 homes, nearly half of which are located in Cablevision’s two franchise areas. While public data does not reveal SNET’s actual subscribership in Cablevision’s two franchise areas, it is currently providing cable service to

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<sup>4/</sup> RCN Comments at 7.

<sup>5/</sup> *Id.* at 4.

<sup>6/</sup> Compare *id.* at ii (81,000 video connections at the end of 1998) with *id.* at 4 (260,000 present video connections).

<sup>7/</sup> *Id.* at 4.

<sup>8/</sup> See NCTA Comments at 1.

<sup>9/</sup> RCN Comments at 5, 7.



almost 29,000 homes, and therefore undoubtedly is serving thousands of homes in Cablevision's service areas.<sup>10/</sup> In New York City, RCN has local authority to serve the entire city. In Cablevision's New York City franchise area, 51% of the homes passed are in buildings with more than twelve units and over 36,000 of those homes already are being served by both Cablevision and a competitive SMATV provider. In New Jersey, RCN has declared its intention to provide OVS service in 75% of Cablevision's franchise area and has just announced its first local agreement with the City of Hoboken. With 25% of the homes passed in New Jersey within MDUs like New York City, suburban New Jersey is a natural area for RCN's expansion. And in the Cleveland, Ohio area, Ameritech will be offering service to 20% of Cablevision's market by the end of 1999.

Between them, RCN's and Ameritech's existing authority encompasses 10 million households or more.<sup>11/</sup> As their growth rates reflect, each is pursuing subscribers aggressively within their authorized areas, and neither shows any sign of stopping there. Ameritech continues to expand the number of its cable franchises, increasing them by almost 50% in the past year alone.<sup>12/</sup> Since initial comments were filed, RCN has filed another application for OVS authority, this one for Seattle<sup>13/</sup> and announced its agreement in Hoboken, New Jersey, and its comments reflect that more agreements are in the works in Maryland, California, and Arizona.<sup>14/</sup>

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<sup>10/</sup> See Letter from Christopher J. Harvie, Counsel for Cablevision, to Deborah Lathen, Chief, Cable Services Bureau, at 2 (Aug. 3, 1999), CSR-5031-E, CSR-5152-E.

<sup>11/</sup> RCN Comments at 4 (OVS certifications encompass more than 8 million homes) and 9 (RCN also operates franchised cable systems in Pennsylvania and New Jersey); Comments of Ameritech New Media, Inc. at iii (Ameritech franchises represent 1.7 million households) ("Ameritech Comments").

<sup>12/</sup> Ameritech Comments at iii.

<sup>13/</sup> Public Notice, "RCN Telecom Services of Washington, Inc. Files An Application For Open Video System Certification," DA 99-1700 (Cable Services Bureau Aug. 24, 1999).

<sup>14/</sup> RCN Comments at 8.

These developments represent true competition to Cablevision. As the Commission has acknowledged, “a LEC’s presence can have a competitive impact on a cable operator before the LEC finishes installing its plant or rolling out its service.”<sup>15/</sup> Thus, the competitive reality that Cablevision faces encompasses not only competition existing today, but the imminent prospect of future competition throughout most of the areas Cablevision serves.

**B. Competitive Developments Argue for Expedited Grant of “Effective Competition” Petitions.**

While the Commission recently acted on several effective competitive petitions,<sup>16/</sup> other remain pending.<sup>17/</sup> In the face of expanding competition, cable operators need the same flexibility in pricing and packaging of equipment and services that their competitors have. The competition documented in this proceeding – as well as the concrete threat of even more competition – will operate to keep cable rates in check, just as intended by the “effective competition” standard. Thus, there is no reason for the Commission to delay its resolution of effective competition petitions.

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<sup>15/</sup> Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, *Report and Order*, CS Docket No. 96-85 (rel. Mar. 29, 1999) ¶11.

<sup>16/</sup> See *Cablevision of the Midwest, Inc., Middleburgh Heights, OH, Petition for Determination of Effective Competition*, Memorandum Opinion and Order, DA 99-1683, File No. CSR-5345-E (rel. Aug. 24, 1999); *Time Warner Communications, Petition for Determination of Effective Competition*, Memorandum Opinion and Order, DA 99-1685, File No. CSR-5378-E (rel. Aug. 24, 1999); *Time Warner Communications, Inc., Seminole, Florida, Petition for Determination of Effective Competition*, Memorandum Opinion and Order, DA 99-1684, File No. CSR-5385-E (rel. Aug. 24, 1999); *MediaOne of Massachusetts, Petition for Determination of Effective Competition*, DA-99-1686, File No. CSR 5395-E (rel. Aug. 24, 1999); *Time Warner Cable, Petition for Determination of Effective Competition*, Memorandum Opinion and Order, DA 99-1651, File No. CSR 5098-E (rel. Aug. 19, 1999).

<sup>17/</sup> See *Cablevision of Boston, Inc., Petition For Determination of Effective Competition*, Petition for Special Relief, Docket No. CSR 5048-E (filed July 14, 1997) (“*Cablevision of Boston Petition*”); *In the Matter of Cablevision Systems of Southern Connecticut*, CSR 5031-E (filed June 12, 1997) (seeking rate deregulation in a six-town franchise area in southern Connecticut composed of the towns of Fairfield, Bridgeport, Stratford, Milford, and Orange); *In the Matter of Cablevision of Connecticut, L.P.*, CSR 5152-E (filed November 7, 1997) (“*Area Petition*”) (seeking for rate deregulation in a ten-town franchise area in Connecticut composed of the towns of Greenwich, Stamford, New Canaan, Darien, Norwalk, Westport, Weston, Wilton, Easton, and Redding).

For example, RCN represents that its service in the Boston area already has had an impact on incumbent service providers. Such providers, RCN reports, have responded “by improving their services, lowering or foregoing rate increases, offering bulk discounts to MDUs, or otherwise providing service or lower-cost service to their subscribers”<sup>18/</sup> – precisely what competition is supposed to bring about. As the Commission is aware, Cablevision previously filed a petition for special relief requesting that a determination be made by the Commission that the City of Boston is subject to effective competition as a result of competition provided by RCN.<sup>19/</sup> RCN’s recent franchise with the City requires it to extend its cable television system to over 265,110 homes passed in Boston by the end of 2002, which represents approximately 90% percent of all Boston households, and to complete its city-wide system within six years.<sup>20/</sup> Thus, RCN’s service will more than “substantially overlap” Cablevision’s service area – it will duplicate it precisely. This proceeding underscores that effective competition exists in the City of Boston, and Cablevision therefore urges the Commission to act promptly to grant its petition for special relief.

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<sup>18/</sup> RCN Comments at iii. *See also id.* at 5, n.8 (“[attached articles] provide a striking tableau of the competitive pressures RCN is introducing in the Boston area”); at 5-6 (“[c]ompetition in the Boston area has led to reductions in price increases by incumbent cable systems, a rate freeze in one community, and promises from incumbents to improve service and customer relations.”); and at 11 (“[f]aced with the prospect of significant new competition, the entrenched monopolists have reacted both by improving their services and service offerings, moderating rate increases, or in other ways advantageous to consumers.”).

<sup>19/</sup> *See Cablevision of Boston Petition*. On August 3, 1999, Cablevision filed supplemental correspondence informing the Commission that RCN and the City of Boston had signed a 15 year cable television license. *See* Letter from Christopher J. Harvie, Counsel for Cablevision, to Deborah Lathen, Chief, Cable Services Bureau, at 2 (Aug. 3, 1999), CSR-5048-E.

<sup>20/</sup> *See id.* If RCN fails to meet these and other household construction and activation targets, RCN will be subject to liquidated damage penalties of up to \$400 per day. *See id.*

## **II. RCN RAISES ISSUES THAT DO NOT PRESENT SIGNIFICANT BARRIERS TO COMPETITION**

Despite the dramatic growth of RCN and its counterparts in other markets, RCN seeks to paint a dire picture. According to RCN, competition is being thwarted by underhanded tactics of cable competitors and must be rescued by rulings in RCN's favor on every one of RCN's pending requests for ruling or reconsideration. This self-serving picture is contradicted by the very real growth in competition reflected in RCN's own submission, as well as by examination of each of the issues RCN raises.

Each of these issues deserves to be resolved on its own merits on a competitively neutral basis without deliberately tilting the competitive playing field simply because RCN is a competitor to cable.

### **A. RCN's Own Comments Belie Its Access-to-Programming Complaints.**

Lacking the willingness to develop their own programming, RCN and other competing MVPDs predictably advocate expansion of the program access rules set forth in Section 628 of the Communications Act.<sup>21/</sup> These commenters urge the Commission to ignore the plain language of Section 628 and impose the program access regime on terrestrially-delivered video programming. RCN's comments specifically discuss its pending program access complaint against a Cablevision-affiliated terrestrial programmer, the MetroChannels.<sup>22/</sup>

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<sup>21/</sup> RCN Comments at 18-23; Ameritech Comments at 7-9; Comments of DIRECTV, Inc. at 2-4; Comments of BellSouth Corporation et al. at 14-17.

<sup>22/</sup> *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation*, CSR No. 99-5404-P (filed May 8, 1999). Launched in August, 1998, the MetroChannels consist of a suite of three terrestrially-delivered local programming services – MetroGuide, MetroLearning and Metro Traffic & Weather – that serve as the video version of a local newspaper. Focusing on regional information and entertainment, education, traffic and weather, arts and leisure, cultural events, sports, live programming and events, Metro aims to marry viewer interest in local information and entertainment content with the two-way interactive capabilities of advanced cable network infrastructures.

The *Comcast* program access decisions<sup>23/</sup> correctly recognized that both the plain language and the legislative history of Section 628 make clear that the program access provisions apply only to video programming distributed via satellite.<sup>24/</sup> RCN's suggestion that terrestrially-delivered programming could be subject to the constraints of Section 628 via the Commission's ancillary authority under Sections 4(i) and 303(r) is likewise unavailing, given Congress' express decision to limit the ambit of program access rules to satellite cable programming.<sup>25/</sup> As the Cable Services Bureau has noted, Congress "did not prohibit cable operators from delivering any particular type of programming terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved."<sup>26/</sup> Thus, there is no basis for holding that the movement of programming from satellite to terrestrial delivery either violates Section 628 or could be actionable under Sections 4(i) or 303(r), since "a practice permitted under the Communications Act and the Commission's rules cannot, without more, form the basis of a claim of unfair competition."<sup>27/</sup> Nor is there a basis to expand the program access rules still further to include, as RCN has requested in its complaint, the right to pick and choose programs, rather than carry a program service in its entirety.

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<sup>23/</sup> *EchoStar Communications Corp. v. Comcast Corp.* DA 99-235 (rel. Jan. 26, 1999) ("EchoStar"), application for review pending; *DirecTV, Inc. v. Comcast Corp.*, DA 98-2151 (rel. Oct. 27, 1998) ("DirecTV"), application for review pending (collectively "*Comcast cases*").

<sup>24/</sup> *EchoStar* at ¶ 21; *DirecTV* at ¶ 25.

<sup>25/</sup> See *Pioneer's Preference Rules*, Memorandum Opinion and Order on Remand, 9 FCC Rcd 4055 (1994); *Nationwide Wireless Network Corp.*, Memorandum Opinion and Order, 9 FCC Rcd 3635 (1994). See also *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-25 (1989); *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987).

<sup>26/</sup> *EchoStar* at ¶ 28; *DirecTV* at ¶ 32.

<sup>27/</sup> *In the Matter of Dakota Telecom, Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sports Channel, and Bresnan Communications*, CSR 5381-P (rel. July 1, 1999) ("*Dakota Telecom Inc.*") at ¶ 21, quoting *American Cable Co. v. Telecable of Columbus, Inc.*, 11 FCC Rcd 10090, 10114 (1996).

RCN's threadbare claim that "the cable industry is resorting to terrestrial transmission in large part to avoid the program access provisions" is likewise without foundation.<sup>28/</sup> RCN's condemnation of terrestrial delivery ignores the Commission's own recognition of potential advantages arising from terrestrial delivery,<sup>29/</sup> as well as the Bureau's findings in the *Comcast* cases.<sup>30/</sup> The Answer to the RCN program access complaint against the MetroChannels proffered considerable evidence that terrestrial delivery of MetroChannels provided significant and substantial economic, business and technical advantages over satellite transmission.

Neither RCN nor any other commenter has offered any tangible evidence that their ability to compete has been hampered by a lack of access to terrestrially-delivered programming. Although RCN claims in its comments that this programming is "essential,"<sup>31/</sup> it fails to make any demonstration that there is any additional number of potential subscribers who would take the service if only RCN also carried MetroChannels. These commenters simply assert baldly a need for mandatory access to such programming, and thus urge the Commission to overturn the Cable Services Bureau's correct application of the law in the *Comcast* decisions.

The Commission should reject the unwarranted and unlawful expansion of the program access regime sought by RCN and other competitors, each of whom already has access to all the popular cable programming services needed to offer viable, competitive alternatives to

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<sup>28/</sup> RCN Comments at 20-21.

<sup>29/</sup> See Letter from William E. Kennard to The Honorable W.J. (Billy) Tauzin, Responses to Questions at 6 (Jan. 23, 1998) (Noting that the "relative advantages of satellite as compared to terrestrial distribution of programming are largely determined by the geographic scope of the distribution involved" and that "fiber links provide greater programming distribution flexibility and the regional interconnections are used in some instances for the distribution of local or regional advertising sales").

<sup>30/</sup> See *EchoStar* at ¶¶ 22-25; *DirecTV* at ¶¶ 26-29.

<sup>31/</sup> RCN Comments at 11.

incumbent cable operators.<sup>32/</sup> There is no evidence that terrestrial delivery is hindering competition in the video programming marketplace.<sup>33/</sup> While Cablevision and its programming affiliates continue to put millions of dollars of investment capital to risk in developing new, innovative programming services like the MetroChannels, deep-pocket competitors such as RCN, General Motors' DirecTV, and Ameritech have declined to invest in programming themselves.<sup>34/</sup> Instead, they have devoted considerable energy and resources to demanding that the government expand the range of programming developed by others that is subject to the mandatory access and price control requirements of Section 628. While such risk-averse

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<sup>32/</sup> See e.g., *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2136 ¶ 160 (1995) ("The Commission's enforcement of the program access provisions appears to be meeting one of the goals of the 1992 Cable Act - ensuring access by competing MVPDs to satellite cable programming from vertically integrated programming services."). See also *1997 Video Competition Report*, 13 FCC Rcd at 1071 ¶ 56 (citing "the large number of channels and programming variety, especially sports and movies" available on DBS) (emphasis supplied), 1088 ¶ 86 (citing "expanded channel offerings, multiplexed premium and numerous pay-per-view channels, special sports and special events packages" available on SMATV), 1134 ¶ 191 (citing Ameritech's "80 channels on ... basic" plus channels such as the History Channel, ESPN2, PASS, the Golf Channel and the Disney Channel as well as several premium channels). See also RCN-Cable TV <[http://www.rcn.com/cable/main\\_cable.html](http://www.rcn.com/cable/main_cable.html)> (touting that "RCN cable customers are enjoying a rich array of programming including the most popular cable channels"); Ameritech's americast - Channel Program and Offerings/Channel Lineups <<http://www.ameritech.com/products/americast/channellup.html>> (noting that "americast offers over 90 channels of great entertainment, including the most popular channels"); Introducing EchoStar's DISHPlayer <<http://www.dishnetwork.com/satserv/DISHPlayer/index.html>> (stating that customers can choose from an unmatched selection of "programming services, including premium movie channels, sports packages, international programming and specialized channels").

<sup>33/</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, CS Docket No. 97-248, at ¶71 (rel. Aug. 10, 1998) ("*Ameritech Report and Order*").

<sup>34/</sup> RCN has aligned itself with Potomac Electric Power Company (PEPCO), the nation's largest utility, and Boston Edison, which provides electricity to more than half a million customers in Boston and thirty-nine surrounding towns. In 1997, Pepco generated revenues of almost \$2 billion and controlled assets of almost \$7 billion. See Potomac Electric Power Company Form 10-K, filed March 27, 1998. Boston Edison and Pepco each have reportedly contributed three hundred million dollars to RCN to finance their separate ventures, promising to "flex some muscle" on behalf of RCN and leverage their substantial resources in its behalf. "Xpanding any which way it can," Jupiter Communications Newsletter, May 1, 1998. DirecTV is a unit of Hughes Electronic Corporation which is aligned with General Motors. See *DirecTV: Hughes Completes Acquisition of PrimeStar Medium - Power DBS Business* <<http://www.directv.com/press/pressdel/0,1112,5,00.html>>. Ameritech has announced its intent to merge with SBC, one of the world's leading diversified telecommunications companies. SBC has also acquired SNET which provides communications, information and entertainment services to Connecticut homes and businesses. See Ameritech 10-K at 1.

strategies may benefit the bottom lines of these competitors, they contravene the public interest by discouraging investment in new programming and stifling program diversity. In short, both the language of Section 628 and the public interest compel rejection of RCN's effort to expand the program access regime.

**B. Massachusetts Regulatory And Court Proceedings Reflect Legitimate Questions About RCN's Utility Affiliations**

In the same vein, RCN states that expansion of its plant in the Boston area is dependent on its ability to use existing underground facilities in Boston owned by Boston Edison and on Bell Atlantic-Massachusetts' speed at making conduit and pole space available to it, and claims that "[b]oth forms of construction have proven to be far slower than anticipated because RCN's competitors have sought to slow its penetration into their respective monopoly markets."<sup>35/</sup>

RCN omits that some of the proceedings at issue have been pursued not by RCN's competitors, but by regulators and public advocates who share legitimate concerns about RCN's relationships with major electric utilities in its principal service areas. In the Boston metropolitan area, RCN operates as a limited liability corporation that is a joint venture with Boston Edison Company.<sup>36/</sup> The Massachusetts Department of Telecommunications and Energy (the "DTE") opened an investigation to determine whether or not Boston Edison's investment in the subsidiary which partnered with RCN was appropriate.<sup>37/</sup> If the opening of this proceeding has played a part in the "slowed construction" alleged by RCN, it was not as a result of actions

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<sup>35/</sup> RCN Comments at 6.

<sup>36/</sup> *Id.* at 5.

<sup>37/</sup> Cablevision described the nature of this investigation in its 1998 Reply Comments. *See* Reply Comments of Cablevision Systems Corporation, In the Matter of Annual Assessment of The Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 98-102 at 10-13 (filed Aug. 31, 1998).



by an RCN competitor as RCN claims. The DTE opened this investigation on its own motion, and the Massachusetts Attorney General intervened on behalf of electric ratepayers.

During the proceedings, evidence was entered to demonstrate that Boston Edison knew or should have known it needed approval to enter the telecommunications business through the joint venture, yet chose not to seek such approval. Boston Edison contributed to the joint venture a fiber optic network, rights of way, cash and guarantees that far exceeded the amount of investment authorized by the DTE, according to expert testimony. In addition, the facilities contributed to the joint venture initially were built as electric plant counted toward the company's rate base. As part of the deal, Boston Edison and RCN entered into an "Exchange Agreement" pursuant to which Boston Edison could convert (and recently has converted) its interest in the joint venture to RCN stock for the benefit of Edison shareholders, not of the ratepayers who would have been charged for the fiber optic network had the deal with RCN not been struck.

At the conclusion of the hearings, the Attorney General concluded that Boston Edison was guilty of "willful violations" of DTE orders and that "significant remedial actions are necessary to reverse any harm to the Company's electric customers and to protect the integrity of the regulatory process."<sup>38/</sup> The Attorney General therefore urged the DTE to fine Boston Edison and to require Boston Edison to divest its interest in the joint venture.<sup>39/</sup> If RCN has experienced any slowdown in its construction as a result of this proceeding, such delay stems from the way

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<sup>38/</sup> Brief of Attorney General Investigation of Boston Edison Company, Mass. D.T.E. 97-95, at 3 (filed May 20, 1999).

<sup>39/</sup> *Id.* See *Boston Globe*, "Reilly Attacks Boston Edison-RCN Venture" (June 3, 1999)(attached as Exhibit A).

RCN conducts its business, not from its competitors' efforts to stymie its entrance into the video marketplace.

**C. RCN's Inside Wiring Petition Has No Practical Impact**

RCN's special pleading extends to rearguing its pending request for a ruling reconsidering the Commission's point of demarcation between customer premises wiring and home run wiring in multiple dwelling units and its definition of home run wiring that is "physically inaccessible."<sup>40/</sup> In that proceeding, RCN concedes that the cost of the wiring installation at issue "would not have deterred us and in fact has been budgeted."<sup>41/</sup> RCN therefore concedes that the simple task of cutting and patching sheet rock does not involve any "significant" effect on structures and "significant" additional cost or work, as required to establish that wiring is "physically inaccessible" within the meaning of 47 C.F.R. § 76.5 (mm)(4) and as RCN purportedly claims. Instead, RCN really seeks a change in the Commission's rules and a back-door right of access to premises against an owner or manager's wishes.

RCN's petition was precipitated by construction at four specific buildings in Boston, Massachusetts. Although Cablevision offered to consider each request on a case-by-case basis, since that time Cablevision has received *no* further requests from RCN for access to Cablevision home runs or lockboxes. RCN, meanwhile has obtained a cable television franchise from the Mayor of Boston so that, as a cable operator, it has the same as rights as Cablevision to access to premises pursuant to Mass. Gen. Laws ch. 166A § 22 . Evidently, then, the problem that RCN

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<sup>40/</sup> In The Matter of RCN-BeCoComm L.L.C., Petition for Special Relief, CSR No.311 (filed Sept. 23, 1998). See 47 C.F.R. §§76.5 (mm)(2) and 76.804.

<sup>41/</sup> *Id.*, Affidavit of Thomas K. Steel, attached to RCN-BeCoComm L.L.C. Reply to Opposition to Request for Letter Ruling (filed Nov. 2, 1998).

asks the Commission to hurry up and address with a far-reaching right of access was never widespread and now, in any practical sense, is moot.

**D. RCN's "Adoption" of OVS Is Merely as a Bargaining Tool with Local Franchising Authorities**

RCN also takes aim at negotiations with local franchising authorities and the Fifth Circuit's decision in *City of Dallas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999). RCN's own indifference to OVS status versus Title VI franchising belies the significance of these alleged barriers.

Although RCN claims that its "preferred mode of entry" into the video marketplace is as an OVS provider,<sup>42/</sup> it candidly admits that it follows local franchising authority preference as to what form of agreement to reach, whether OVS or traditional cable television franchise.<sup>43/</sup> And -- to franchising authorities -- RCN has repeatedly expressed a preference for cable franchising.<sup>44/</sup> RCN likewise acknowledges that it carries no third party programming on its OVS systems;<sup>45/</sup> in fact, it refers to program carriage, the quid pro quo of OVS status, as a "burden."<sup>46/</sup>

RCN's comments make it brazenly clear that, even though the Cable Services Bureau has warned that "the open video system framework ... was not created to be used as a bargaining element in the negotiation between a municipality and a prospective video provider,"<sup>47/</sup> that is

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<sup>42/</sup> RCN Comments at i, 3.

<sup>43/</sup> *Id.* at ii, 3-4.

<sup>44/</sup> See Reply Comments of Cablevision Systems Corporation, In The Matter of Annual Assessment of Competition in Markets for the Delivery of Video Programming, CS Docket No. 98-102 (filed Aug. 21, 1998), at 4, quoting RCN at local public hearings ("quite frankly, we'd rather have a franchise than some of the alternatives that are possible, at least by virtue of the Telecommunications Act..." "if you wanted us to do an OVS, certainly we'll listen, but right now we're pushing toward a franchise").

<sup>45/</sup> See RCN Comments at 10.

<sup>46/</sup> *Id.* at 9.

<sup>47/</sup> *Wedgewood Communications Co., Certificate to Operate an Open video System*, Order, DA 97-2438 at ¶23 (released Nov. 20, 1997)

exactly how RCN uses it. RCN acknowledges that “[i]n many instances the availability of the OVS model . . . has proven extremely useful in local negotiations even when RCN has ultimately not followed the OVS route. Faced with the prospect of [diminished local control over an OVS operator] numerous local franchise authorities have exhibited a willingness to negotiate franchises with RCN more rapidly or on terms which are less onerous than would otherwise have been the case.”<sup>48/</sup> Thus, RCN is merely using the OVS regime as a tool to provide leverage during traditional cable franchise negotiations, not as a regulatory regime it has embraced.

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<sup>48/</sup> RCN Comments at 10.

## CONCLUSION

For the reasons discussed above, Cablevision urges the Commission not be swayed by misdirection designed to shift attention from burgeoning growth in video programming competition, and instead to focus on the undeniable growth reflected in the record of this proceeding to date and the accelerating trend toward an even more competitive marketplace.

Respectfully submitted,

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Thursday, June 3, 1999

## ECONOMY

Reilly attacks Boston Edison-RCN venture Attorney general alleges utility violated state orders, should be forced to sell stake  
 Peter J. Howe, Globe Staff

Massachusetts Attorney General Thomas F. Reilly is urging that Boston Edison Co. be fined and forced to sell off its multimilliondollar stake in the RCN venture that is beginning to grab business from Bay State cable television and telephone companies.

In the latest turn in a three-year controversy over Edison's move from electricity into home communications, Reilly charged Edison is clearly guilty of "willful violations" of state orders forbidding it from using its 600,000 electric customers' bills to subsidize its entry into communications. Edison denies all the charges.

RCN provides cable TV, Internet, and phone service in Arlington, Newton, Somerville, and parts of Boston and Waltham and is moving quickly to expand. The state Department of Telecommunications and Energy is reportedly in the homestretch of a now 19-month investigation into whether Edison violated department orders concerning how it could fund its 2-year-old joint venture with RCN, which is based in Princeton, N.J., and also serves areas of New York, Connecticut, and Washington, D.C.

"In light of the clear proof of these willful violations," Reilly said in a May 20 department filing first reported in yesterday's Wall Street Journal, Edison should be forced "to divest its investment in the telecommunications joint venture and to return any net gain to its electric service customers."

Reilly also urged Edison be fined to "protect the integrity of the regulatory process." Reilly's office represents consumers in utility issues.

"We have no plans to divest, because it is a perfectly legal venture," said Michael Monahan, an Edison spokesman. All funds Edison has used for its 49 percent stake in its Massachusetts joint venture with RCN came from shareholder profits, not ratepayer funds, Monahan said.

Depending on how the department rules, Edison customers could get Copr. (C) West 1999 No Claim to Orig. U.S.

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a refund worth several dollars on their bills, and the company's diversification efforts could be thrown into uncertainty.

In 1993, the department allowed Edison to invest up to \$45 million in a new unregulated subsidiary involved in electric cars, a business reducing customers' electric needs, and a generation consulting business.

Reilly and other Edison critics, including Cablevision Systems Corp., which has the Boston cable franchise, contend Edison misused that approval to steer more than \$45 million into the RCN venture.

A major unresolved question involves whether Edison transferred a fiber-optic network it began developing in 1988 for internal utility communications at well below market value to RCN.

Cablevision has unsuccessfully sued Edison to block further work on the RCN network, and is due back in federal court Monday to appeal lower court rulings that supported Edison.

In October 1997, state utility regulators opened a probe of the Edison-RCN controversy. Last month, they concluded taking testimony, and people involved in the case think the department may finally rule by summer's end on whether Edison did anything wrong.

#### INDEX REFERENCES

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## CERTIFICATE OF SERVICE

I, Teresa S. Kadlub, hereby certify that on this 1st day of September, 1999, I caused copies of the foregoing "Reply Comments of Cablevision Systems Corporation" to be served by U.S. mail, first class, postage prepaid, or by hand delivery (\*) on the following:

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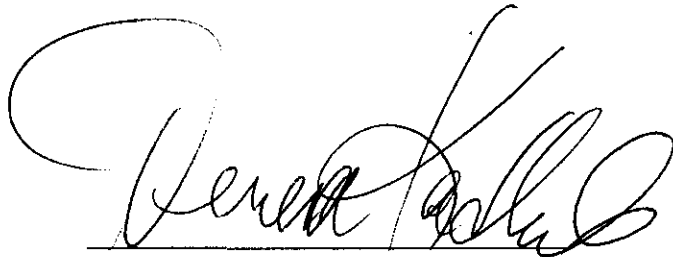
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A large, stylized handwritten signature in black ink, appearing to read "Teresa S. Kadlub", is written over a horizontal line.

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